IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1263 of 1986

For Approval and Signature:

HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RANCHHOD SAMATBHAI BHARVAD

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1263 of 1986

MR NS DESAI for Petitioner No. 1

PUBLIC PROSECUTOR for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 05/09/2003

ORAL JUDGEMENT

The present appeal is filed against the judgment and order of the Addl.Sessions Judge Nadiad dated

28.08.1986 passed in Sessions case no. 83/86 wherein the accused-appellant was convicted under Sec. 304(2) of the Indian Penal Code and sentenced him to undergo rigorous imprisonment for three years (though charge against the appellant was for Sec. 302 of I.P.C., the court convicted the accused-appellant under Sec. 304(2) of I.P.C.).

2. The brief facts of the present case are as under:
It is the case of the prosecution that there is a field of Adesinh in the sim of village Kot which was under cultivation by him. That on 30.12.85 there was standing crop in the field and the deceased went to the field at 10.00 a.m. In the evening at about 5.00 p.m. the present appellant-accused came there with his flock of sheep and goat. Out of the animals, some of them went to the field of the deceased and destroyed the crop to some extent. At that time, the deceased went to the present appellant Ranchhod Samantsing Bharwad who was standing near the canal and told him to take care of his cattle. To this, the appellant gave a stick blow on the head of the deceased due to which he fell down and the accused ran away. According to the prosecution, there were four eye witnesses to this incident i.e. (1) Madabhai Bhavabhai p.w. 3 exh. 10, (2) Laxmansinh S Chavda p.w.4 exh. 11, (3) Shankar Dola p.w. 7 exh. 24 and (4) Bhala Chandsinh p.w. 8 exh. 25. These people took the injured Adesinh and took him to his father Jagatsinh. Thereafter p.w. 2 exh. 9 Jagatsinh tried to bring the vehicle near the place to carry Adesinh to the hospital, however, he failed in his attempt and when he returned back he saw Adesinh dead. Thereafter in the morning he went to the police station by getting vehicle and gave complaint to P.I.Mr.Mansukhlal D Lakhia p.w. 9 exh. 26 who recorded the complaint and after the complaint was filed, the I.O.Mr.Lakhia went further in his investigation and he also informed his higher authority regarding the incident.

3. According to the prosecution, the I.O. went to the place of incident and recorded the inquest panchanama exh. 15 of the body of the deceased and sent the body for autopsy. He also recorded the panchanama of scene of offence at exh. 16. He also recorded the statements of the eye witnesses and other witnesses. At about 4.45 p.m. the accused met and the muddammal stick was seized under panchanama exh. 13. The accused was arrested on the same day at 5.45 p.m. When the witness-I.O. came back to the police station, the P.S.O. seized the clothes of the accused under panchanama exh. 17. Then he prepared the map of the place of incident at exh. 19. He sent the muddammal to F.S.L. for analysis. The

report of the F.S.L. Ahmedabad is produced vide exh. 22 and exh. 23. After finding sufficient evidence against the appellant-accused, the I.O. filed chargesheet against the appellant-accused under Sec. 302 of I.P.C. on 29.03.1986. The offence for which the present accused is tried was not triable by the J.M.F.C.Dakor and therefore committed the case to the Sessions Court, Nadiad.

4. The Addl.Sessions Judge, Nadiad framed charge against the accused at exh. 3. The accused denied the charge against him and claimed to be tried.

5. To prove the charge against the accused, the prosecution examined the following witnesses :(1) p.w.1 Dr.Giriraj Lalabhai Chauhan exh. 7,(2) p.w. 2 Jagatbhai Shabhaibhai exh. 9, (3) p.w. 3 Madabhai Bhavabhai exh. 10, (4) p.w. 4 Laxmansinh Sursing Chavda exh. 11, (5) p.w. 5 Galabsing Balubhai exh. 12, (6) p.w. 6 Gamansing Madhavsing exh. 14, (7) p.w. 7 Shankar Dolabhai exh. 24, (8) p.w. 8 Bhalabhai Chandrasinh exh. 25, (9) p.w. 9 Mansukhlal Dungarbhai Lakhia exh. 26. The prosecution has also produced documentary evidence as under: P.M.notes exh. 8, panchanama of stick at exh. 13, panchanama of scene of offence at exh. 16, inquest panchanama at exh. 15, Seizure of clothes panchanama at exh. 17, map of place of incident exh. 19, report of F.S.L. at exh. 22 & 23 etc.etc.

6. After appreciating the evidence led by the prosecution and after hearing the learned advocates for the parties, the learned Addl.Sessions Judge held that prosecution had failed to prove the charge against the accused under Sec. 302 of I.P.C., however held that the accused is guilty of offence punishable under Sec. 304(2) of I.P.C. and after hearing the accused on the point of sentence, sentenced him as stated above. It is against this judgment and order this appeal is filed.

7. Learned advocate Mr.N.S.Desai for the appellant submitted that the father of the deceased has no personal knowledge of the incident. He had come to know about the incident from the four eye witnesses, who had brought the deceased at his house in an injured condition by lifting him from the scene of offence. The evidence of complainant is unreliable and not believable because due to his carelessness the deceased died. That his evidence on the point of going for searching the vehicle in round about villages is also not believable because he has admitted in his evidence that in his own village there is camel cart and there is also camel cart and tractor in

nearby villages. That in spite of this fact, he could not get any vehicle to take his son to village Rania for immediate medical treatment, even though there is a doctor in village Rania. That according to evidence of complainant he has gone to Dakor police station in a tractor of one Navinbhai of Jesapura at 12 midnight. The deceased died at 1.00 a.m. When the complainant went to Dakor police station, he did not take his son with him for medical treatment in his tractor at 12.00 midnight even though the deceased was living. That this strange behaviour of the father of the deceased did not inspire any confidence in the mind of the court and therefore because of his carelessness his son had died for want of immediate medical treatment.

8. According to the learned advocate for the appellant, according to the evidence of the complainant, when the eye witnesses brought the deceased to the house of the complainant, Mukhi Navratsing had come to the house of the complainant and at that time the witness had narrated the incident to Mukhi and Mukhi had written down his complaint. That the complaint was written by Mukhi, which was given immediately and the first information in point of time does not come forward in this case. Mukhi Navratsing is not examined by the prosecution in order to prove that the complainant has not given such complaint to him. This complaint written by Mukhi is not produced in this case by the prosecution because in that complaint, there was no name of the assailant. Moreover, the deceased Adesing was in the habit of taking liquor and on the day of the incident, he was drunk and he had fallen down from the height of Kotar on the ground and he had sustained injury on his head. On account of his non-returning to his house upto 10.00 p.m., his father and eye witnesses had gone in search of the deceased and they had found the deceased lying on the ground near Kotar in an injured condition and, therefore, he was brought to the house and at that time Mukhi Navratsing had gone to the house of the complainant and the father of the deceased i.e. the complainant had given the complaint to him. However, in the aforesaid circumstances, the prosecution has withheld examining the said Mukhi.

9. It is the case of the prosecution that Adesing was cultivating the field of Jaswantsing Ratansing but the appellant is challenging this fact and in spite of this fact Jaswantsing Ratansing is not examined by the prosecution in this case and therefore adverse inference should be drawn to the effect that deceased Adesing had never cultivated the field of Jaswantsing and therefore

the whole prosecution story about the incident is concocted and fabricated.

10. According to the learned advocate for the appellant-accused, out of four eye witnesses, Shankerbhai Dolabhai and Bhalabhai Chandusing can be termed as chance witnesses. Therefore, their presence at the scene of offence is doubtful. According to their evidence, they had gone to cut the wood in Kotar of Mahi river and while returning they had seen the incident. If the court peruses the deposition of both the chance witnesses, there are many contradictions and the evidence of these two eye witnesses does not inspire confidence and therefore their evidence is not believable.

11. As far as the evidence of eye witness Madabhai Bhavabhai is concerned, he is also chance witness. According to his evidence, he had gone to the sim for grazing his two young buffaloes at 8.00 a.m. and while he was returning to his house at 5.00 p.m. he had seen the deceased and appellant exchanging words with each other and the appellant gave one stick blow on the head of the deceased Adesing and the appellant ran away. The evidence of this witness is also not believable and trustworthy because his evidence is contradictory to the evidence of other witnesses on the point that when they took the deceased to the house of the complainant, at that time the blood was coming out from the head and some blood had fallen down on the ground at the scene of offence and deceased Adesing was bleeding when they had lifted and upto one kilometer the blood was dropping on the ground throughout on the way till they reached the house of the complainant, while other witnesses say that the blood was not dropping on the way. The police had not found any blood marks on the scene of offence nor found any blood on the way. Hence, the deposition of all the eye witnesses cannot be believed.

12. According to Mr.Desai learned advocate for the appellant, the statements of four witnesses were recorded on the next day in the morning whereas from the deposition it appears that the statements were recorded at about 5.00 p.m. at Dakor police station. Therefore, there is a reason to believe that there are two statements of the eye witnesses and the police has failed to produce the first statements wherein the name of the present appellant-accused is not mentioned in the alleged crime. There is a reason to believe that the appellant is falsely implicated in this case by the I.O. and the complainant. According to the learned advocate for the appellant-accused, if the prosecution evidence is to be

believed, then at the most the offence would fall under Sec. 324 of I.P.C. and not under Sec. 304(II) and as the appellant was under trial prisoner during the period of trial, no further sentence should be awarded against him for the offence under Sec. 324 of I.P.C. Hence, according to the learned advocate for the appellant-accused, on account of many discrepancies as mentioned above, the accused be acquitted by allowing this appeal, or at the most, this court should convert the sentence to the sentence undergone.

13. Against the aforesaid submissions, learned A.P.P. Mr.P.R.Abichandani for the State has submitted that the presence of four eye witnesses at the time of the incident was so much natural and they are not relatives of the deceased and they took the injured to his father's house. Though one of the four eye witnesses stated that he is distant relative of the deceased, he has not remained personally present during night. Assuming for the sake of argument that out of four witnesses, two witnesses Shankar Dola and Bhala Chandsinh can be said as chance witnesses then also the statement of the two eye witnesses Madabhai Bhavabhai and Laxmansinh Chavda who has seen the deceased Adesinh with the accused-appellant can be said to be reliable witnesses of the incident. The doctor Dr.G.L.Chauhan who performed autopsy on the body of the deceased is examined as p.w. 1 exh. 7. In clear terms he stated that with the weapon stick the said injury described by him on the deceased can be possible. The defence has also failed to bring on record any alleged enmity between the deceased and appellant-accused, though question to that effect was asked to the complainant Jagatsinh. It is true that some contradictions have been brought on record by the defence, however, they are not so much important which will go to the root of the case and call for the acquittal of the accused-appellant. The prosecution has relied on the case of State of U.P. V/s Anil Singh reported in AIR 1988 S.C. 1998, whereby Mr.Abichandani learned A.P.P. relied on para 15 as under :

> "It is also our experience that invariably the witnesses add embroidery to prosecution story, perhaps for the feat of being disbelieved. But that is no ground to throw the case overboard, if true, in the main. If there is a ring of truth in the main, the case should not be rejected. It is the duty of the court to cull our the nuggets of truth from the evidence unless there is reason to believe that the inconsistencies or falsehood are so glaring as utterly to destroy confidence

> in the witnesses. It is necessary to remember that a Judge does not preside over a criminal trial merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. One is as important as the other. Both are public duties which the Judge has to perform."

So far as the blood marks of the deceased are concerned, while drawing the panchanama of scene of offence produced at exh. 16 it is crystal clear that due to the ingress and egress of the persons and animals on the site of the incident and on the way to the house of the complainant, the panchas could not find the marks of blood at such place. The said panchanama also shows crops which was damaged recently. There was a reason to believe that the goats and sheep which were with the appelant-accused has entered the field of injured deceased Adesinh and spoiled the crop which caused the ultimate murder of injured Adesinh.

14. So far as the non-examination of Mukhi is concerned, his presence at the time of bringing the injured-deceased Adesinh at the place of complainant is in doubt. It is stated by all the eye witnesses that when they brought the injured Adesinh, they did not see Mukhi at the place of Jagatsinh. Therefore, the question of telling Mukhi about the alleged incident by any of the witnesses does not arise at all. Therefore, the prosecution has rightly not examined Mukhi.

15. So far as the ownership of the field wherein the deceased Adesinh was cultivating is concerned, it is the say of the defence that it was a kharaba land and land has not been given to anyone for cultivation by the Government. Therefore the examination of the witness Jaswantsinh to the alleged land owner does not arise at all. In view of the aforesaid circumstances, the appeal deserves to be dismissed.

16. I have perused the deposition of witnesses on record which were read before me by the learned advocate for the appellant-accused and learned A.P.P. for the State. I am in agreement with Mr.Abichandani, learned A.P.P. for the State on the ground that the presence of four eye witnesses at the place of incident can be said to be natural. They all four brought the injured Adesinh at the house of complainant Jagatsinh and after talking to him they all went to their houses. None of them were related to injured Adesinh or his family members and therefore the presence of four eye witnesses may not be

doubted at all. The defence has also failed to prove any enmity on record between any of the eye witnesses or between the complainant and injured deceased Adesinh. The deposition of Dr.Chauhan p.w.1 at exh. 7 who performed autopsy on the dead body of Adesinh, has in clear terms stated that the injury stated by him can be possible by one blow of stick. The injury was inflicted on vital part of the body which caused death of the injured Adesinh. The death was caused due to internal hemorrhage and therefore the doctor has stated that blood came out from nose and ear. In view of the aforesaid circumstances, I am also of the opinion that the conviction by the trial court under Sec. 304(2) is proper and no interference is required by this court. It is a one blow injury and that caused death of young man who must be having wife and children. I do not see any reason to convert the sentence of 304(2) of I.P.C. into Sec.324 of I.P.C. and sentence accused for lesser punishment.

17. Therefore this appeal deserves to be dismissed and accordingly it is dismissed. The appellant is ordered to surrender to jail authorities forthwith to complete his remaining sentence. His bail bonds stand cancelled.

(SHARAD D DAVE, J)

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